



**Statement  
Of  
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**Expiring Tax Incentives: Examining their Importance for Small Business  
on the Road to an Economic Recovery  
Before the  
House Small Business Committee  
Wednesday, September 30, 2009**

Chairwoman Velazquez, Ranking Member Graves, members of the Committee, NRF commends you for holding this important hearing to evaluate the impact on small business of the tax provisions scheduled to expire at the end of 2009 and other stimulus measures.

I am Rachelle Bernstein, Vice President and Tax Counsel for the National Retail Federation (NRF), which is the world's largest retail trade association. NRF represents an industry with more than 1.6 million U.S. retail establishments, more than 24 million employees, about one in five American workers, and 2008 sales of \$4.6 trillion. Many NRF members and most retailers are small businesses. Ninety-six percent of retail businesses have only one location.

#### Retail Industry in Recession

In 2008, retailers' holiday sales, which typically represent 25-50% of their annual sales, declined by 2.8%. During the past year, consumer confidence hit its lowest level since records have been kept. For the first time in its long history, NRF is forecasting a decline in annual retail sales for 2009.

Retailers lost 535,000 jobs in 2008 and another 299,200 jobs through August of 2009. A consumer confidence survey conducted the first week of September showed consumers less confident than they were in August, with 70.2% of consumers having no confidence that there will be a strong economic recovery. Retail sales for the past three months continue to show sharp year-over-year declines, with declines of 4.3% in August, 5% in July and 3.8% in June.

#### Net Operating Loss Carryback

The tax proposal that would provide the most immediate and beneficial help to retailers that are struggling to survive is the 5 year net operating loss (NOL) carryback. In our current recession, where access to credit is so severely limited, the NOL carryback will provide an important source of capital to finance ongoing operations and retain employees.

An NOL is incurred when a business has negative taxable income. An NOL can be used to obtain a refund for taxes paid in the past and/or carried forward to offset tax obligations that arise in the future. The purpose of the NOL carryover is to smooth out changes in business income, and taxes on that income, throughout the business cycle, which will encourage investment and increase economic efficiency.

Under current law, taxpayers may carry losses back 2 years and forward 20 years. Although both the House and Senate versions of the 2009 economic stimulus legislation would have permitted all businesses except those that have received TARP funds to carry their losses back for 5 years, the final version of the American Recovery and Reinvestment Act (ARRA) included a 5 year NOL carryback for losses incurred in 2008 only for businesses with less than \$15 million in gross receipts. This provision needs to be expanded so that size of business is not a factor in limiting the benefit of the carryback. It also should be extended to cover losses incurred in 2009 because, as I stated earlier, it appears that the sales decline for 2009 will be worse than 2008.

There is precedent for extending the carryback period for the NOL in times of recession. After 9/11, the Job Creation and Worker Assistance Act of 2002 extended the NOL carryback period from two to five years for losses incurred in 2001 and 2002. NRF strongly supports H.R. 2452, bipartisan legislation introduced by Representatives Richard Neal and Pat Tiberi, the Chairman and Ranking Member of the Select Revenue Measures Subcommittee of the House Ways and Means Committee. H.R. 2452 would permit businesses to carryback losses from 2008 and 2009 for 5 years. President Obama included a similar proposal in his Fiscal Year 2010 Budget.

Because current law allows taxpayers to carry losses forward for as many as 20 years to reduce future tax liability, allowing for this longer carryback period is merely an advance on a tax refund that would be due to them in the future. This advance on a future tax refund provides a much needed source of cash for operations as businesses are struggling through this recession.

Because retail sales have fallen so dramatically over the past year and access to capital has been so limited, retailers are struggling to find the cash they need to operate their businesses as the economy moves toward recovery. For most retailers, 25-50% of their annual sales occur during the last quarter of the year – during the holiday season. In fact “Black Friday,” the day after Thanksgiving, marks the beginning of the period when retailers go from being “in the red” (i.e. losing money) to being “in the black” (i.e. turning a profit). If struggling retailers cannot finance inventories for the 2009 holiday season, which is their greatest opportunity for revenue for the year, they could go out of business.

The problem can be illustrated with the stories of two of our smaller chain retail members. These retailers are too large to be able to qualify for loans from the Small Business Administration, too small to have been able to negotiate large enough lines of credit to carry them through this recession, not credit worthy enough to qualify for TALF (businesses must be AAA rated to benefit), and too large to be eligible for the NOL carryback permitted to small businesses in ARRA. In both of these situations, the retailers are struggling to find ways to finance their inventory for this holiday season. In the first case, a small specialty chain, the ability to use a modest (less than \$10 million) 2008 NOL carryback to finance inventory worth 5 times as much could mean the difference in staying in business for its 2000 permanent employees, and additional 6000 seasonal employees. In the second situation, a regional specialty chain operating in 4 western states predicts that it will close one-third of its remaining stores if it does not get the cash influx from its 2008 NOL carryback. That will result in a loss of 800 jobs. For businesses that are not on the brink of survival, the NOL carryback will allow them to make some new investments, like improvements to their stores, which there is also no capital to finance in this current environment. These investments would create new jobs that are so desperately needed in this economy. Members of the Committee, if the NOL carryback is not enacted soon, tens of thousands of additional retail jobs will be lost.

#### Depreciation of Improvements to Retail Stores, Restaurants and Leased Property

The existing 39-year recovery period for real estate improvements grossly overstates the actual economic life of structures and improvements, increasing the cost of

capital and distorting business decisions. In 2004, Congress recognized this problem and enacted a temporary provision to shorten the depreciable life of leasehold and restaurant improvements from 39 to 15 years. Recognizing that this provision put retailers who owned their property, many of which were small businesses, at a competitive disadvantage compared to those who leased their stores, in 2008 Congress extended the 15-year depreciable life to improvements made to stores that are owned by retailers, as well. The 15-year depreciable life for improvements made to leasehold, retail and restaurant space is scheduled to expire at the end of 2009. The President's Fiscal Year 2010 Budget proposes to extend this provision through the end of 2010.

The recovery period for real estate is not based upon the actual life of the property, but rather is the result of several incremental increases in the depreciation period that Congress enacted in order to raise revenue. Studies conducted by the Treasury Department, Congressional Research Service and private economists all have found that the depreciable life for buildings is too long and that the depreciation rules for investments in nonresidential structures may be the only type of investment where tax rules provide for decelerated cost recovery. As a result, current depreciation allowances generate high tax costs for these investments and cause investors to under invest in these projects.

Retailers generally remodel their stores every 5 to 7 years to reflect changes in customer taste and needs. Retailers must update their stores in order to compete in the marketplace. Because of the sharp decline in 2009 retail sales, retailers were forced to cut all but the most essential operating expenses during this past year. As a result, many retailers canceled planned improvements to their stores. The cancellation of these improvements resulted in severe job losses in the construction industry. Many retailers have even more urgent needs for improvements in 2010, which they are currently trying to plan for. However, because retail sales have not yet turned around, cost will be a major factor in going forward with these improvements. If the 15 year depreciable life for improvements is not extended, the after-tax cost of these improvements will increase dramatically and will result in fewer projects in 2010. This will severely affect the ability of the construction industry to re-hire workers.

### Conclusion

Both the NOL carryback and the extension of the 15 year life for improvements to retail, restaurant and leasehold property will have a direct and positive impact on employment in the current economy. It is not only important for Congress to extend these provisions, but also it is important that these extensions be enacted soon. Delaying action will impact thousands of jobs. We urge the Small Business Committee to lend its support to extension of these important tax provisions.

Thank you for the opportunity to participate in this important hearing.